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View Esteem Sdn Bhd v Bina Puri Holdings Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(C)(A)-1507–09 OF 2015
HAMID SULTAN, PRASAD ABRAHAM AND ASMABI MOHAMAD JJCA
22 AUGUST 2016

C

Contract — Building contract — Appeal — Appeal against decision of High Court — Claim for interim certificate — Whether claim for interim certificate inextricably interwoven with previous claim — Absence of relevant interim certificates in adjudication claim — Whether application ought to be set aside and dismissed — Construction Industry Payment and Adjudication Act 2012

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The appellant/employer ('View Esteem') in a construction contract relating to Construction Industry Payment and Adjudication Act 2012 ('the CIPAA 2012') appealed against the decision of the learned High Court judge in respect of three applications made by the parties relevant to CIPAA 2012 where the decisions were in favour of the respondent/contractor/employee ('Bina Puri'). The learned trial judge had dismissed both of View Esteem's applications and allowed Bina Puri's application to enforce an award. The reference to adjudication was related to interim certificate No 28. However, View Esteem had taken the view that the claim for interim certificate was inextricably interwoven with a previous claim of Bina Puri relating to interim certificate No 23 to 26R. The claimed amount was for RM12,860,689.02. The court entered summary judgment for part of the claim and the balance sum of RM4,050,919.15 under certificate No 26R was ordered to be referred to arbitration. The interim certificate No 23 to 26R had been issued by the quantity surveyor ('QS') and had been certified by the architect, thereby complying with the contractual provision. However, what was absent in the adjudication claim was that the relevant interim certificates had not been certified by the architect in consequence of the View Esteem's own breach and/or conduct, not to act within the spirit and intent of the contractual provision. View Esteem had made a single application to set aside the adjudicating order as well as seeking for stay of the adjudication decision.

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Held, dismissing the appeal with costs:

(1) **(per Hamid Sultan JCA)** A single application to set aside an adjudicating order was embarrassing as well as flawed and ought to have been dismissed at limine. The reason being that s 16 of the CIPAA envisages that there is already in existence an application to set aside the

adjudication award. In consequence, a stay application could only be filed upon having filed an application for setting aside (see para 30).

(2) **(per Hamid Sultan JCA)** The trial court must be extremely slow in granting an application for stay as the purpose of CIPAA is to ensure that the contractor gets his due immediately. In dealing with the stay application, trial court ought also take note that in almost all standard form of construction contract, the employee is protected by unjustified claim from the contractor as there will be provision for certification of the claim by neutral persons such as QS as well as architect as in the instant case (see para 31).

(3) **(per Hamid Sultan JCA)** The appeal bore no merits. The purported s 41 application to challenge the jurisdiction of the adjudicator was unsustainable for reasons stated earlier and ought to have been dismissed *in limine*. In any event, the jurisdictional challenge was considered by the adjudicator and the complaint was not entertained. In any event the learned trial judge has considered the relevant principles relating to setting aside as well as stay and came to the conclusion that the application must be dismissed. The setting aside and stay application had no merits and rightly dismissed by the trial court. In consequence, the learned trial judge was correct in allowing the enforcement application for the enforcement of the adjudication award (see para 34).

(4) **(per Hamid Sultan JCA)** Section 26 of the CIPAA is peculiar to our legislation and does not appear in similar legislation of comparable jurisdictions. Parliament in the arrangement of the sections of CIPAA placed s 26 in between the mechanics and jurisdiction of the process of adjudication. In looking at s 26(1) non-compliance by the parties with the provisions of this act whether in respect of time limit, form or content or in any other respect shall be treated as an irregularity (see para 39).

(5) **(per Prasad Abraham JCA, supporting)** The intention of Parliament was clear in that any irregularity in wide terms will not render the adjudication proceedings a nullity in consonance with the spirit of the act ie 'to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication. To come within the purview of s 26(1), a party must invoke the provisions of s 26(2) of the CIPAA relying on the subsection most suitable to the facts of the dispute before the adjudicator (see paras 41–42).

(6) **(per Prasad Abraham JCA, supporting)** The appellant should have moved the adjudicator formally to allow matters not raised under the payment response pursuant to s 26 2(b)/(c) of the said section. The adjudicator would have had to deal with that question and rule accordingly and such a ruling would not be reviewable. If the adjudicator had refused to entertain the application on a point of jurisdiction, then

the same would be subject to review (see para 43).

(7) **(per Prasad Abraham JCA, supporting)** The issue of jurisdiction encompassed in s 26 of the CIPAA concerns jurisdiction on the question of irregularity of procedure or of a defect in a contingent jurisdiction" or non- compliance with statutory conditions precedent to the validity of a step in the proceedings. Section 26(1) of CIPAA is wide in terms and covers all aspects of the act including adjudication proceedings s 26(2) deals specifically with non-compliance in respect of adjudicator proceedings and the powers reserved to the adjudicator are wide as set out in 2(a), (b) or (c) (see paras 47–48).

[Bahasa Malaysia summary

Perayu/majikan ('View Esteem') dalam kontrak pembinaan berkaitan Akta Industri Pembinaan Pembayaran dan Adjudikasi 2012 ('AIPPA') telah merayu terhadap keputusan hakim Mahkamah Tinggi yang bijaksana berkaitan tiga permohonan yang dibuat oleh pihak-pihak berkaitan kepada AIPPA 2012 di mana keputusan menyebelahi responden/kontraktor/pekerja ('Bina Puri'). Hakim perbicaraan yang bijaksana telah menolak kedua-dua permohonan View Esteem dan membenarkan permohonan Bina Puri untuk menguatkuasakan award. Rujukan kepada adjudikasi adalah berkaitan sijil interim No 28. Walau bagaimanapun, View Esteem telah mengambil pandangan bahawa tuntutan untuk sijil interim berkaitan jalinan dengan tuntutan terdahulu Bina Puri berkaitan sijil interim No 23 hingga 26R. Jumlah yang dituntut adalah untuk RM12,860,689.02. Mahkamah telah memasuki penghakiman terus untuk sebahagian daripada tuntutan itu dan baki jumlah RM4,050,919.15 di bawah sijil No 26R telah diperintahkan ntuk dirujuk kepada timbang tara. Sijil interim No 23 hingga 26R telah dikeluarkan oleh juruukur bahan ('JB') dan telah disahkan oleh arkitek, yang mana mematuhi peruntukan kontraktual. Walau bagaimanapun, apa yang tiada dalam tuntutan adjudikasi adalah bahawa sijil-sijil interim relevan tidak disahkan oleh arkitek berikutan pelanggaran dan/atau perbuatan View Esteem sendiri, untuk tidak bertindak dalam semangat dan niat peruntukan kontraktual itu. View Esteem telah membuat satu permohonan untuk mengetepikan perintah adjudikasi dan juga memohon penggantungan keputusan adjudikasi.

Diputuskan, menolak rayuan dengan kos:

(1) **(oleh Hamid Sultan HMR)** Satu permohonan untuk mengetepikan perintah adjudikasi adalah memalukan dan juga cacat dan patut ditolak secara limine. Sebabnya adalah kerana s 16 AIPPA membayangkan bahawa telahpun terdapat satu permohonan untuk mengetepikan award adjudikasi. Akibat tu, satu penggantungan permohonan hanya boleh difailkan setelah permohonan untuk penepian difailkan (lihat perenggan 30).

(2) **(oleh Hamid Sultan HMR)** Mahkamah perbicaraan perlu lambat dalam memberikan permohonan untuk penggantungan kerana tujuan AIPPA adalah untuk memastikan bahawa kontraktor memperoleh apa yang perlu dibayar kepadanya dengan segera. Dalam mengendalikan permohonan penggantungan, mahkamah perbicaraan juga patut mengambil kira bahawa dalam hampir semua bentuk standard kontrak pembinaan, pekerja adalah dilindungi oleh tuntutan yang tidak wajar daripada kontraktor kerana terdapat peruntukan untuk pengesahan tuntutan oleh orang neutral seperti JB dan juga arkitek sepertimana dalam kes ini (lihat perenggan 31).

(3) **(oleh Hamid Sultan HMR)** Rayuan itu tidak mempunyai merit. Tujuan permohonan s 41 untuk mencabar bidang kuasa hakim tidak dapat dikekalkan oleh sebab-sebab yang dinyatakan terlebih dahulu dan patut ditolak *in limine*. Dalam apa keadaan, cabaran bidang kuasa dipertimbangakan oleh hakim dan aduan itu tidak dilayan. Dalam apa keadaan hakim perbicaraan yang bijaksana telah mengambil kira prinsip-prinsip relevan berkaitan penepian dan juga penggantungan dan tiba kepada kesimpulan bahawa permohonan itu harus ditolak. Permohonan penepian dan penggantungan tidak mempunyai merit dan telah ditolak sewajarnya oleh mahkamah perbicaraan. Akibat itu, hakim perbicaraan yang bijaksana adalah betul dalam membenarkan permohonan penguatkuasaan untuk penguatkuasaan award adjudikasi itu (lihat perenggan 34).

(4) **(oleh Hamid Sultan HMR)** Seksyen 26 AIPPA adalah khusus kepada perundangan kita dan tidak kelihatan dalam perundangan sama dalam bidang kuasa yang dibandingkan. Parlimen dalam aturan seksyen-seksyen AIPPA meletakkan s 26 antara mekanisme dan bidang kuasa proses adjudikasi. Dengan melihat kepada s 26(1) ketidakpatuhan oleh pihak-pihak dengan peruntukan-peruntukan akta ini sama ada berkaitan had masa, bentuk atau kandungan atau dalam apa-apa keadaa lain hendaklah dianggap sebagai satu luar aturan (lihat perenggan 39).

(5) **(oleh Prasad Abraham HMR, menyokong)** Niat Parlimen adalah jelas bahawa apa-apa ketidateraturan dalam terma yang luas tidak menjadikan prosiding terbatal persesuaian dengan semangat akta iaitu untuk memudahcara bayaran tetap dan tepat pada masanya, untuk menyediakan mekanisme bagi penyelesaian pertikaian yang cepat melalui adjudikasi. Untuk terangkum dalam skop s 26(1), satu pihak harus menggunakan peruntukan s 26(2) AIPPA bergantung kepada subseksyen yang paling sesuai kepada fakta pertikaian di hadapan hakim (lihat perenggan 41–42).

(6) **(oleh Prasad Abraham HMR, menyokong)** Perayu sepatutnya memohon hakim secara formal untuk membenarkan perkara-perkara yang tidak ditimbulkan di bawah bayaran itu bertindak balas menurut s

26(2)(b)/(c) seksyen tersebut. Hakim perlu mengendalikan persoalan tersebut dan membuat keputusan sewajarnya dan keputusan tersebut tidak boleh disemak semula. Jika hakim enggan melayan permohonan itu berhubung perkara bidang kuasa maka yang sama yang tertakluk kepada semakan semula (lihat perenggan 43).

(7) **(oleh Prasad Abraham HMR, menyokong)**Isu bidang kuasa yang termaktub dalam s 6 AIPPA adalah berkenaan bidang kuasa berhubung persoalan ketidakteraturan prosedur atau tentang kecacatan dalam bidang kuasa kontingen atau ketidakpatuhan dengan prasyarat statutori berhubung kesahan suatu langkah dalam prosiding. Seksyen 26(1) AIPPA adalah luas dalam terma-terma dan meliputi semua aspek akta itu termasuklah prosiding adjudikasi s 26(2) berkenaan khususnya dengan ketidakpatuhan berkaitan prosiding adjudikasi dan kuasa-kuasa yang dirizabkan kepada hakim adalah luas sepertimana dinyatakan dalam sub-s (2)(a), (b) atau (c) (lihat perenggan 47–48).]

Notes

For cases on building contract in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3869–4077.

Cases referred to

Balfour Beatty Construction Ltd v Lambeth London Borough Council [2002] EWHC 597 (TCC), QBD (refd)

Carillion Construction Ltd v Devonport Royal Dockyard [2005] EWHC 778 (TCC), QBD (refd)

Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering and Construction Co Ltd [2010] 1 SLR 658, HC (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565, FC (refd)

Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal [2013] 1 SLR 401, CA (refd)

Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93, QBD (refd)

Ngan Siong Hing v RHB Bank Bhd [2014] 2 MLJ 449; [2014] 3 CLJ 984, CA (refd)

Perantara Properties Sdn Bhd v JMC Kelana Square [2016] 5 CLJ 367, CA (refd)

View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd [2015] MLJU 695, HC (refd)

WY Steel Construction Pte Ltd v Osko Pte Ltd [2013] SGCA 32, CA (refd)

Legislation referred to

Arbitration Act 2005

Building and Construction Industry Security of Payment Act 2005 [SG] ss 18,

19, 27
Construction Industry Payment and Adjudication Act 2012 ss 5, 6, 6(2), 7, 9, 10, 13, 15, 15(b), (c), (d), 16, 26, 26(1), (2), (2)(a), (2)(b), (2)(c), 27, 27(2), 28, 41
Rules of Court 2012
Rules of the High Court 1980 O 2

Appeal from: Originating Summons Nos 24C-19–06 of 2015, 24C-21–06 of 2015 and 24C-22–07 of 2015 (High Court, Kuala Lumpur)

Chetan Lachman Jethwani (Kumar Partnership) for the appellant.
Foo Joon Liang (Tan Min Lee with him) (Gan Partnership) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant/employer in a construction contract relating to Construction Industry Payment and Adjudication Act 2012 ('the CIPAA 2012') appeals against the decision of the learned High Court judge in respect of three applications made by the parties relevant to CIPAA 2012, where the decisions were in favour of the respondent/contractor/employee.

[2] For purpose of convenience, the appellant/employer will be referred to as View Esteem and the respondent/contractor/employee will be referred to as Bina Puri.

[3] The learned trial judge had heard the three applications in the court below:

(a) the first application was purportedly made to challenge s 41 of the CIPPA 2012 by View Esteem with a view to challenge the jurisdiction of the adjudicator. The said section reads as follows:

> 41 Savings
>
> Nothing in this Act shall affect any proceedings relating to any payment dispute under a construction contract which had been commenced in any court or arbitration before the coming into operation of this Act.

(b) the second application was Bina Puri's application, seeking registration and enforcement of the award as a judgment of the court pursuant to s 28 of the CIPPA 2012. The said section reads as follows:

> 28 Enforcement of adjudication decision as judgment
>
> (1) A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.
>
> (2) The High Court may make an order in respect of the adjudication

decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.

(3) The order made under subsection (2) may be executed in accordance with the rules on execution of the orders or judgment of the High Court.

(c) the third application was by View Esteem, to set aside and/or stay the award of the adjudication pursuant to ss 15–16 of the CIPPA 2012. The said sections read as follows:

15 Improperly Procured Adjudication Decision

An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

(a) The adjudication decision was improperly procured through fraud or bribery;

(b) There has been a denial of natural justice;

(c) The adjudicator has not acted independently or impartially; or

(d) The adjudicator has acted in excess of his jurisdiction.

16 Stay of Adjudication Decision

1. A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:

(d) An application to set aside the adjudication decision under section 15 has been made; or

(e) The subject matter of the adjudication decision is pending final determination by arbitration or the court.

2. The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit.

[4] The learned trial judge had written 80 pages judgment setting out the facts and law in meticulous detail. To save courts time, we do not wish to repeat what was said in the judgment save where necessary. This judgment must be read together with the High Court judgment which has been reported in *View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd* [2015] MLJU 695 for comprehensiveness.

[5] In conclusion, the learned trial judge had dismissed both of View Esteem's applications and allowed Bina Puri's application to enforce the award. View Esteem's memorandum of appeal reads as follows:

1. The Learned Judge erred in law and fact in dismissing the Appellant's application in Kuala Lumpur High Court Originating Summons No. 24C-19-06/2015 to

declare the adjudication proceedings between the Appellant and the Respondent void for want of jurisdiction.

2. The Learned Judge erred in law and in fact in dismissing the Appellant's application in Kuala Lumpur High Court Originating Summons No. 24C-22-07/2015 to set aside and/or stay the Adjudication Award dated 16.06.2015.

3. The Learned Judge erred in law and in fact in allowed the Respondent's application in Kuala Lumpur High Court Originating Summons No. 24C-21-07/2015 which allowed the Respondent to enforce the Adjudication Award dated 16.06.2015.

4. The Learned Judge erred in law in holding that Section 41 of the Construction Industry Payment and Adjudication Act, 2012 ('CIPAA') did not apply to the adjudication proceedings between the Appellant and the Respondent. In particular:

4.1. The Learned Judge failed to consider and/or sufficiently appreciate that the claims brought by the Respondent in Kuala Lumpur High Court Civil Suit No. 22NCC-405-05/2013 *('the 405 Suit')* are identical and/or substantially similar to the subject matter of the adjudication proceedings brought by the Respondent under CIPAA;

4.2. The Learned Judge erred in law and fact in holding that the subject matter of the adjudication proceedings excluded the claims that were brought in the 405 Suit;

4.3. The Learned Judge erred in law in holding that the phrase 'payment dispute' under Section 41 of CIPAA must necessarily be determined with reference to Section 5 and 6 of CIPAA;

4.4 The Learned Judge erred in law in holding that the phrase 'commenced in court or arbitration' under Section 41 of CIPAA must be read to mean proceedings which were still pending completion;

4.5. The Learned Judge failed to appreciate and/or sufficiently consider that in order for Section 41 to apply, the Appellant need only demonstrate that the claim for payment for work done in the adjudication proceedings or a substantial part of it had already been referred to court prior to the coming into force of CIPAA; and

4.6. The Learned Judge erred in law in holding that the Appellant's claim in Kuala Lumpur High Court Suit No. 22NCVC-349-05/2013 does not concern a payment claim or payment dispute within the meaning of CIPAA.

5. The Learned High Court Judge erred in law and in fact in failing to consider and/or sufficiently appreciate that the Respondent's actions in bringing its claims under CIPAA in light of the prior proceedings pending in court constituted an abuse of process of CIPAA.

6. The Learned High Court Judge erred in law and in fact in refusing to set aside the Adjudication Award under Section 15(b), (c) and (d) of CIPAA. In particular:

6.1 The Learned Judge erred in law in holding that the Appellant was not entitled to raise its defences in the absence of raising the same defences in its payment response issued under Section 6 of CIPAA;

6.2 The Learned Judge erred in law in holding that Section 6(4) had no application to any party who had issued a payment response under Section 6 of CIPAA;

6.3 The Learned Judge failed to appreciate and/or sufficiently consider that Section 5, 6 and 21 of CIPAA must be read to include Sections 9, 10 and 11 of CIPAA;

6.4 The Learned Judge failed to appreciate and/or sufficiently consider that by allowing the Appellant to rely on its Adjudication Response there would not be an evolving claim for determination before the adjudicator;

6.5 The Learned Judge erred in law in holding that Section 5 and 6 CIPAA were tantamount to pleadings in a civil action and that the parties could not depart from the same because there is no provision to amend a party's CIPAA claim;

6.6 The Learned High Court judge failed to appreciate and/or sufficiently consider that the three excluded arguments raised by the Appellant could amount to a set-off and/or a reduction of the Respondent's claim;

6.7 The Learned Judge failed to consider and/or sufficiently appreciate that there was a breach of natural justice on the part of the adjudicator in excluding the three defences of the Appellant on the grounds that it was outside the adjudicator's jurisdiction;

6.8 The Learned Judge failed to consider and/or sufficiently appreciate that the three excluded defences would operate to reduce and/or negate the Respondent's claim;

6.9 The Learned Judge failed to consider and/or sufficiently appreciate that the purpose of Section 6(4) CIPAA was to provide some protection to respondents in light of the restrictions and speed at which CIPAA proceedings are conducted and as such ought to be given a broad reading.

7. The Learned Judge erred in law and in fact in holding that there was no breach of natural justice or bias in the Adjudication Award dated 16.06.2015. In particular:

7.1 The Learned Judge erred in fact in holding that there was no bias and/or partiality in the adjudicator's Award dated 16.06.2015;

7.2 The Learned Judge erred in law and in fact when she found that the adjudicator had applied a different treatment of the evidence tendered by the parties but nevertheless failed to hold that the Adjudication Award dated 16.06.2015 was tainted with bias and/or partiality;

7.3 The Learned Judge erred in law and /or fact in holding that not every denial of natural justice or unequal treatment warrants intervention of the courts under Section 15. The Learned Judge erred in law in applying the English decisions of *Balfour Beatty Construction Ltd. v. Mayor Burgess*

London Borough of Lambeth 12002] Adj. LR 04/2012 and *Carillion Construction Ltd. v. Devenport Royal Dockyard Limited* [2005] EWHC 778. In so doing the Learned Judge failed to consider and/or sufficiently appreciate that the law in England provided for sufficient safeguards against injustice which are not present in CIPAA;

7.4 The Learned Judge erred in law and/or in fact in holding that the adjudicator was correct in finding that there was interference by the Appellant in the duties of the project architect;

7.5 Given the various findings and statements by the adjudicator the Learned Judge erred in law and in fact in all the circumstances of the case in holding that the Adjudication Award was not tainted with partiality and bias.

8. The Learned Judge erred in law and in fact in dismissing the Appellant's application for stay of proceedings under Section 15 CIPAA. In particular:

8.1 The Learned Judge erred in law in placing an unduly stringent test of exceptional circumstances in order to grant a stay of the Adjudication Award under Section 16 CIPAA;

8.2 The Learned Judge erred in law in failing to consider and/or sufficiently appreciate that the Learned Judge was empowered to order a partial stay and/or conditional stay in the appropriate circumstances and that such circumstances were present given the exclusion of the Appellant's defences from the adjudication proceedings;

8.3 The Learned Judge erred in law in holding that the only ground on which a stay could be granted under Section 16 CIPAA would be the financial ability of the Respondent to repay the adjudication award;

8.4 The Learned Judge erred in law in applying the English and Singaporean decisions in coming to her conclusion given the great differences in the statutory regime in England and Singapore; and

8.5 The Learned Judge erred in law in failing to consider and/or sufficiently appreciate that Section 16 of CIPAA was to provide a safeguard against unfairness and injustice in the application of CIPAA and that a restrictive interpretation of Section 16 was not appropriate in the circumstances.

9. For the reasons stated hereinabove, the learned Judge erred in law and in fact in allowing the Respondent's application for enforcement of the Adjudication Award dated 16.06.2015. Had the Learned Judge appreciated and/or sufficiently considered the Appellant's position, the Learned Judge would have set aside and/or stayed the Adjudication Award and refused enforcement of the Award.

BRIEF FACTS

[6] The reference to adjudication was related to interim certificate No 28. However, View Esteem had taken the view that the claim for interim certificate

is inextricably interwoven with a previous claim of Bina Puri relating to interim certificate No 23 to 26R (in particular 26R). The previous claim was litigated in court in suit No 405. The claimed amount was for RM12,860,689.02. The court entered summary judgment for part of the claim and the balance sum of RM4,050,919.15 under certificate No 26R was ordered to be referred to arbitration.

[7] What is important to note in suit No 405 was that the interim certificate No 23 to 26R had been issued by the quantity surveyor ('QS') and had been certified by the architect, thereby complying with the contractual provision.

[8] What is absent in the adjudication claim is that the relevant interim certificates had not been certified by the architect in consequence of the View Esteem's own breach and/or conduct, not to act within the spirit and intent of the contractual provision. We will not elaborate on this issue as the learned trial judge had dealt with it in detail, save to say that breach amount to abuse within the concept of *ex turpi causa non oritur action* principles (see *Ngan Siong Hing v RHB Bank Bhd* [2014] 2 MLJ 449; [2014] 3 CLJ 984).

[9] What was referred to adjudication was the progress claim No 28 which included interim valuation 27R which was not certified by the architect. It was the View Esteem's position that the interim certificate 26R and 27R are related and in consequence they have taken the position that it is not amenable to adjudication and s 41 will apply. What is important to note is that View Esteem argument is oppressive in nature and abuse of contractual terms in not facilitating for certification by the architect. The payment response of View Esteem sets out their position which will be reproduced shortly.

[10] After the commencement of adjudication process, View Esteem took out the purported s 41 application. Before the application was disposed of in the High Court, the adjudicator had already delivered the award. In consequence, View Esteem had filed an application for setting aside the award as well as stay.

[11] Learned counsel for View Esteem had summarised the argument for this appeal as follows:

9.1 Bina Puri was not entitled in law to commence an action in adjudication against View Esteem pursuant to Section 41 of CIPAA;

9.2 The jurisdictional challenges raised by Bina Puri in respect of matters not raised in the Payment Response pursuant to Sections 5 and 6 of CIPAA, ought not be allowed;

9.3 There were breach of natural justice and bias in the Adjudication Decision; and

9.4 The Learned Judge ought to allow View Esteem's application to stay the Adjudication Decision.

[12] To appreciate the appellant and respondent arguments in the right perspective, it will be useful to set out the payment claim and payment response which are *sine qua non* for initiating as well as adjudicating a claim under CIPAA 2012. The said payment claim reads as follows:

Payment Claim with regard to Progress Claim No. 28 issued by Bina Puri Holdings Bhd

We refer to the above.

2. This payment claim is made pursuant to Section 5 of the Construction Industry Payment and Adjudication Act 2012.

Contract

3. By a Letter of Acceptance dated 10th September 2009, you have awarded us the aforementioned Project for the contract sum of RM185,000,000.00. It is agreed that the said award shall incorporate the terms and conditions under the Agreement and Conditions of PAM Contract 1998, as amended by the agreement of parties (Contract). The design component of the Project was to be undertaken by your consultants.

4. Clause 30 of the Contract provides that:

(a) Within 14 days from the submission by us of a detailed signed statement showing the value of the works done and material on site, the Quantity Surveyor appointed by you is to value our works and material on site and the Architect appointed by you is required to issue an interim certificate certifying the value of works done for interim payment; and

(b) You are required to make payment to us within thirty (30) days from the date of the Interim Certificate.

5. CKP Nizaruddin Jurukur Bahan Sdn Bhd (CKPN) is your appointed Quantity Surveyor. JO Architects was your appointed Architect. We were informed by your undated letter which we received on or around 16th July 2014 that JO Architects had terminated their services with effect from 12th May 2014. On 20th May 2014, Akipraktis Architects (Akipraktis) was appointed as the Architect for the Project.

6. Both the Quantity Surveyor and the Architect are your agents.

Progress Claim No. 28

7. By our letter dated 23rd May 2013, we submitted our Progress Claim No. 28 to the Quantity Surveyor. Progress Claim No. 28 claims for work done and materials supplied for the period from 1st October 2009 to 30th August 2012, brief particulars of which are as follows:

Item	Description	Contract Amount (RM)	Workdone (RM)
1	Bill No. 1 - General Conditions & Preliminaries	13,934,388.06	20,713,789.40
2	Bill No. 2 - Basement Carpark	695,302.78	695,302.78
3	Bill No. 3 - Carpark Podium	1,669,695.11	1,669,695.11
4	Bill No. 4 - Commercial Podium	1,248,541.24	1,248,541.24
5	Bill No. 5 - Service Apartment	93,343,183.23	93,343,183.23
6	Bill No. 6 - Infrastructure Works	1,422,692.76	1,422,692.76
7	Bill No. 7 - Landscape Finishes	2,419,666.44	2,419,666.44
8	Bill No. 8 - Bridge (Fly Over)	1,913,866.67	1,913,866.67
9	Bill No. 9 - Prime Cost and	67,121,433.75	62,957,687.67
	Provisional Sums - Profit & Attendance for PC Sum	1,231,229.96	1,259,153.75
	ORIGINAL CONTRACT SUM	185,000,000.00	187,643,579.05
10	VARIATION WORKS Variation Order No. 1 to 73	4,174,702.25	4,118,893.04
	Variation Order for NSC - Profit & Attendance for PC Sum	9,674,507.29 193,490.15	9,563,705.99 191,274.12
	TOTAL VARIATION WORKS	14,042,699.69	13,873,873.15
	REVISED CONTRACT SUM	199,042,699.69	201,517,452.20
11	*ADD* Material On Site		
	WORKDONE TO-DATE + MOS	199,042,699.69	201,517,452.20
12	ADD/LESS: Adjustment made for VOP:- Rebar - Page 1 Rebar - Page 2 Rebar - Page 3 Rebar - Page 4 BRC - Page 1 BRC - Page 2 BRC - Page 3 Concrete		(414,659.98) 452,577.36 (101,563.12) (64,051.79) 87,128.26 380,288.88 708,467.18 96,610.97
	GROSS WORKDONE TO-DATE	199,042,699.69	202,662,249.97

Item	Description	Contract Amount (RM)	Workdone (RM)
13	Retention Sum (10% or 5% max) Release of 1stmoiety of Retension Sum		(9,250,000.00) 4,625,000.00
	NETT WORKDONE TO-DATE		198,037,249.97
14	LESS: Previous Amount Certified (up to Cert. No): 26R		(174,194,742.69)
	TOTAL THIS PROGRESS CLAIM		23,842,507.28

A copy of Progress Claim No 28 (without its attachments) is enclosed herewith marked 'Attachment A'. Particulars of our claim herein are set out in this attached Progress Claim No. 28.

8. CKPN has valued our claim under Progress Claim No. 28 and issued its Interim Valuation No. 27, valuing the amount due to us in respect of our Progress Claim No. 28 as RM5,891,998.22. CKPN's Interim Valuation No. 27 was forwarded to JO Architects by CKPN s letter dated 10th March 2014.

9. However, in breach of the Contract, JO Architects failed, refused and/or neglected to issue an interim certificate in respect of the Interim Valuation No. 27 within 14 days from its submission, or at all. We received JO Architect s letter dated 18th March 2014 informing us that JO Architect has suspended its services apparently with effect from 1st August 2013.

10. Thereafter, upon your appointment of Akipraktis, CKPN by its letter dated 5th August 2014 to Akipraktis, forwarded what was termed as Interim Valuation No. 27R to Akipraktis for their certification. Interim Valuation No. 27R again valued our Progress Claim No. 28 as the same RM5,891,998.22. We are made to understand that Interim Valuation No. 27R was revised only because of the change in the Architect.

11. In further breach of the Contract, Akipraktis has by its letter dated 25th August 2014 resigned as the superintending officer for the Project, without forwarding its interim certificate on Interim Valuation No. 27R. In this connection, we were informed that Interim Certificate No. 27 has been duly signed by Akipraktis, but was not delivered to us on the instructions of your Mr Foong Peng Yew.

Date Payment due

12. Pursuant to Clause 30 of the Contract, our Progress Claim No. 28 was due to be certified on 6th June 2013 (i.e. 14 days from the date Progress Claim No. 28 was submitted), and due to be paid on 6th July 2013 (i.e. within 30 days from when certification was due).

13. In breach of the Contract, you have:

> 13.1 through your agents wrongfully under-valued our Progress Claim No. 28 and consequently denied us payment of the RM23,842,507.28 claimed by Progress Claim No. 28: and

13.2 in any event, failed, refused and/or neglected to make payment, or to ensure payment in accordance with the Contract, of the sum of RM5,891,998.22 on or before 6th July 2013 as valued in Interim Valuation No. 27.

Payment Due

14. In the circumstances, this payment claim is for the sum or RM23,842,507.28 as claimed by our Progress Claim No. 28, together with interest thereon at the rate of 5% per annum form 7th July 2013.'

The said response claim reads as follows:

Bina Puri Holding Berhad's Progress Claim No. 28 for the sum of RM23,842,507.28 ('PC No. 28')

We refer to the above matter and to *your letter to us dated 7th October 2014* which serves as your *PC No. 28* with *Attachment A* enclosed therein (your Final Summary for the period ending 31st May 2013) - all of which we received on the *8th October 2014.*

We dispute your *PC No. 28* on the following grounds:-

1. On the *25th April 2013* you have submitted your *Progress Claim No. 27* for the sum of *RM23,721,340.87* for the period ending *30th April 2013.* But within a month you submitted *PC No. 28* on the *23rd May 2013* for the sum of *RM23,842,507.28* for the period ending *31st May 2013* - an increase of *RM121,166.41* from your *Progress Claim No. 27.*

1.1 Both your *Progress Claim No. 27* and *PC No. 28* did not enclose other necessary documentations to support your claims, other than the BQs.

2. Notwithstanding your *PC No. 28,* the Consultant QS - CKP Nizaruddin Jurukur Bahan Sdn Bhd (*CKP*) has issued *Interim Valuation No. 27R dated 10th March 2014 ('IV 27')* for the sum of *RM5,891,998.22* only (we *will address our dispute on IV 27 later),* and you have candidly admitted in *paragraph 8 of your letter dated 7th October 2014* that *CKP has evaluated your PC No. 28 and issued IV 27 for the sum of RM5,891,998.22*

3. A comparison between your *PC No* 28 *and CKP's IV* 27 show substantial differences as follows:

No	Particulars	Bina Puri	CKP's IV 27	Difference
a	Original contract sum	RM187,643,579.05 (as claimed by Bina Puri In PC No. 28)	RM185,000,000.00	RM 2,643,579.05
b	VO1	RM 13,873,873.15	Omission (RM 575,174.84)	RM14,449,047.99
c	VOP (Variation of Price)	RM 1,144,797.77	RM 286,915.75	RM 857,882.02
d	Total			RM17,950,509.06

3.1 The Total Difference of RM17,950,509.06 in *Item d* of the *Table*

above is obviously the difference between your *PC No. 28* and *IV 27: RM23,842,507.28 - RM5,891,998.22 = RM17,950,509.06*

3.2 It is clear from the above that a substantial part of your claim under *PC No. 28* has been rejected when CKP issued *IV 27.*

Our dispute on IV 27R:

4. *IV 27R* remains a valuation only and no Architect certificate has been issued on the same. We have no contractual obligation to make payment on *Interim Valuation* issued by the consultant QS.

4.1 We have by our letter to *CKP dated 18th August 2014 and 26th August 2014* which were copied to you, stated our dispute on *IV 27R*. In short, we reiterate that *Interim Certificate 26R* and *IV 27R* are interrelated and if our queries on *Interim Certificate 26R* have not been satisfactorily dealt with (and the Court has also upheld our dispute), we are not able to accept the amount valued in *IV 27R*.

4.2 Akipraktis has by letter to CKP dated *15th October 2014* sought clarification on *IV 27R.*

5. As you have repeatedly quoted some contractual provisions and alleged that we are in breach of the Contract (which is denied), we would like to state the relevant contractual provisions as follows:-

5.1 *Clause 13.1 of the Conditions of Contract* prohibits the *Contract Sum* to be adjusted or altered - which you have unilaterally done so in *PC No. 28* as shown in *Item a of the Table* above.

5.2.1 *Clause 30.2 of the Conditions of Contract* imposes on you the obligation to *'submit details and particulars to the Architect, sufficient for the Architect to consider and ascertain the amount to be stated in an Interim Certificate'* during the *Period of Interim Certificates* Therefore, your right to submit *PC No. 28* comes with the corresponding obligation to submit the relevant supporting documents, which you are in breach of. As such, by right there is really no obligation on CKP's part to issue any *Interim Valuation,* or the Architect to issue any *Certificate* on your *PC No. 28*

5.2.2 *According to the Appendix to the Conditions of Contract* the *Period of Interim Certificates is One (1) month* and not *14 days* as quoted in *paragraph 12* of your *letter dated 7.10.2014* And *the Period of Honoring Certificates in One (1) month* from *the date of issuance of the Interim Certificate, not* from the expiry of 14 days from the date of *submission* of your *PC No. 28.*

5.3 Therefore, our obligation to make payment *{if any, which is denied)*only arises upon the expiry of *One (1) month* from the *date of issuance* of the *Architect's Certificate*, which in *non-existent* to date in so far as your *PC No. 28* is concerned. For this reason, we have no obligation to pay *IV 27R* or your *PC No. 28* from *6.7.2013* as demanded in *paragraphs 12, 13.1 and 13.2 of your letter dated 7.10.2014,* Similarly, your claim for interest calculating *from 7.7.2013* is also misconceived.

6. In conclusion, it is clear that your *PC No. 28* is a *grossly inflated & uncertified claim,* we could not be so imprudent to make payment on the same.

7. We further deny *paragraph 11 or your letter dated 7th October 2014.* Our Mr. Foong has the right and is performing his duty to inform the Architect of our dispute on *IV 27* and explained to the Architect our reasons thereof, it was not an *instruction*' to the architect to withhold as you have baselessly assert.

8. We are rather perplexed by your resistant and refusal when it could have been easily resolved if you had extended your full cooperation by submitting all the necessary and proper documentation for CKP to do a proper valuation of your *PC No. 28.* We hereby put you on notice that we will hold you responsible for any unnecessary legal costs being incurred by us if you chose to proceed further with your claim under section 5 of CIPAA 2012'.

[13] Before the adjudicator, the appellant introduced additional grounds other than what was stated in the payment response which was not entertained by the adjudicator, and forms the complaint in relation to the appellant's application. The adjudicator's reason was, inter alia, as follows:

The Claimant's Jurisdictional Challenges

10.0 At the commencement of the Hearing, the Claimant made a jurisdictional challenge on three counter-claims and/or set-offs filed by the Respondent in the Adjudication Response.

The Claimant submitted as follows:

apart from the issues concerning the variation orders, there are 3 specific heads of claim, if I may draw your attention to it ... defective works ... that is essentially a counter-claim for defective works which no doubt the Respondent will content to be deducted ... the second is ... breach resulting in encroachment... this involves the curved bridge and it is essentially a claim in damages which again, the Respondent will ask for it to be deducted from our claim ... third item is ... the advance of RM2 millions to my Client.

The issue we take and we highlighted this in our Adjudication Claim as well as Adjudication Reply that these were not items that were raised or referred to even in the Payment Response ... This goes to the issue of jurisdiction.

As some of the matters raised in the Adjudication Response fall outside the scope of the Payment Response in the Adjudication Reply, made without prejudice to the Claimant's rights to raise this argument.

Essentially, the point I am making, the 3 broad items of the RM2 millions advance, the defects and the encroachment in regards to the curved bridge are not matters that were raised in any of these letters, neither were they raised in the Payment Response.

The Claimant tendered an excerpt from a textbook titled *'Adjudication of Construction Payment Disputes in Malaysia*' published by *LexisNexis* and co-authored by *Chow Kok Fong, Lim Chong Fong* and *Onn Chee Kheng.*

The Claimant referred, inter alia, to the following passages in the textbook:

> Thus, if the non-paying party did not issue a payment response to assert its entitlement to set-off the amount claimed for defects of if he issues a payment response but the payment response fails to raise this defence, this would effectively preclude the adjudicator from considering this defence in the subsequent proceedings.
>
> ... to the matter referred to adjudication by the parties pursuant to sections 5 and the unpaid party and the claimant may resort to section 27(1) of the Act. This sub-section provides that 'the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6. Section 27(1) thus imposes on the adjudicator the following:
>
> (1) The adjudicator is obliged to consider any matter raised in the payment claim (made pursuant to section 5) and the payment response (made pursuant to section 6);
>
> (2) Conversely he is not to consider and has no power to consider any matter which has not been so raised.
>
> Consequently, a failure to raise a defence or a basis for contesting the claimed amount precludes that defence from being considered in the proceedings. Furthermore the adjudicator has no power to allow for this correction of this defect in pleading because both the payment claim and the payment response are served before his appointment.

The Claimant had also cited the case of *Fastrack Contractors Ltd v Morrison Construction Ltd* [2000] BLR 168 that:

> If the adjudicator considers that a jurisdictional challenge has been well made, he should decline to adjudicate. If the objection is only in respect of a part of the reference, he may confine his role to determining that part of the reference over which he has jurisdiction. If the adjudicator considers that the jurisdictional challenge is unsustainable in its entirety, the adjudicator should proceed with the adjudication as referred to him,

11.0 The Respondent's response is summarized as follows:

> ... the Act specifically provides for the power of the adjudicator not to decide on jurisdictional challenges. I would submit that it should not be taken at this oral (hearing) or it should be dealt with by way of legal argument at the end of the adjudication proceedings ... insofar as evidence collection is concerned, it should not be limited by jurisdiction challenge from the outset of the case ... you could take the evidence first... and we deal with it in your decision.
>
> ... whether we can raise matters in adjudication reply rather that adjudication response, I would take the position that it is clear from the act that section 6.4, it is deemed (to have disputed the entire payment claim) from no response. It cannot be a position that just because you do not respond to an adjudication response, you are precluded from dealing with it or raising the matter by way of adjudication reply providing there is some nexus to the claim that is made. In

this particular instance, the items ... relate directly to the works that are being claimed upon ... in the adjudication reply.

... defective works. There are substantial defective works here. They are entitled to make or ask a deduction,

... breach of contract resulting from encroachment. We are arguing later that there is encroachment... there may be some damages, we can establish it is part of their obligation, so an appropriate deduction should be made on that. So it should be adjusted in interest of fairness.

... the advance of the RM2 millions ... RM2 millions is an advance we mads to them.

... insofar as jurisdiction is concerned, there is an automatic denial of the claim, there has been a payment response and document has been exchanged from the outset; I don't see any prejudice. It is only fair to be allowed here. These claims are intrinsically linked to the claim that they made.

... there is a textbook that they provide but it is really too early for anyone ... to say how it should be read. It is at best an early view ... So I think to decide to exclude evidence and jurisdiction on the outset may lead to unfairness.

With respect, I disagree with the respondent.

12.0 I know that CIPAA is an Act with procedures and rules that are meant to be strictly enforced for rapid resolution of construction payment disputes.

I have carefully considered the parties' submissions and arguments. I agree with the authors of the textbook tendered by the Claimant that '... to the matter referred to adjudication by the parties pursuant to sections 5 and the unpaid party and the claimant may resort to section 27(1) of the Act. This sub-section provides that 'the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6' and 'consequently, a failure to raise a defence or a basis for contesting the claimed amount precludes that defence from being considered in the proceedings. Furthermore the adjudicator has no power to allow for this correction of this defect in pleading because both the payment claim and the payment response are served before his appointment.
I find that the provisions of the Act are clear that I do not have jurisdiction to hear and consider the Respondent's three counter-claims and/or set-offs in this reference.

13.0 I find for the Claimant's jurisdictional challenges and I hold that the following counter-claims and/or set-offs by the Respondent shall be excluded from these proceedings:

13.1 The Respondent's claimed cost of rectification of defects;

13.2 The Respondent's advance of RM2 millions to the Claimant; and

13.3 The Respondent's claimed damages with regards to the encroachment of the curved or flyover bridge.

JURISPRUDENCE RELATING TO CIPAA AND THE RELEVANT SECTIONS.

[14] The CIPAA 2012 has been formulated to provide a summary relief to meet with construction related claim. It is not the function of the court to review the decision of the adjudicator relating to quantum in detail as the Act itself provides a mechanism by way of arbitration and/or litigation to sort out the final accounts of the parties, wherein the adjudicators' award can be reviewed. It is important for the courts to take cognisance of the short title and commentary to the Act which reads as follows:

> An Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.

[15] What it means strictly is that the court should for all intent and purpose facilitate regular and timely payment and ought not be engaged by dilatory and/or abusive applications to oppose the award and/or stay of the award as evident also by case laws in many other jurisdictions.

[16] Arriving at the CIPAA 2012 adjudication award is a two stage process. First stage is related to payment claim and payment response. Parties at this stage may settle the matter and if the matter is not settled. The dispute as borne out in the payment claim and response can only be referred to the adjudicator. This is statutorily a strict requirement (subject only to s 26) as set out in s 27, thereby making the first stage as an important stage in the adjudication process. The relevant sections for the first stage are ss 5–6 and 27.

Section 5 reads as follows:

> 5 Payment claim
>
> (1) An unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract.
>
> (2) The payment claim shall be in writing and shall include —
>
> (a) the amount claimed and due date for payment of the amount claimed;
>
> (b) details to identify the cause of action including the provision in the construction contract to which the payment relates;
>
> (c) description of the work or services to which the payment relates; and

(d) a statement that it is made under this Act.'

Section 6 reads as follows:

6 Payment response

(1) A non-paying party who admits to the payment claim served on him shall serve a payment response on the unpaid party together with the whole amount claimed or any amount as admitted by him.

(2) A non-paying party who disputes the amount claimed in the payment claim, either wholly or partly, shall serve a payment response in writing on the unpaid party stating the amount disputed and the reason for the dispute.

(3) A payment response issued under subsection (1) or (2) shall be served on the unpaid party within ten working days of the receipt of the payment claim.

(4) A non-paying party who fails to respond to a payment claim in the manner provided under this section is deemed to have disputed the entire payment claim.

Section 27 reads as follows:

27 Jurisdiction of adjudicator

(1) Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.

(2) The parties to adjudication may at any time by agreement in writing extend the jurisdiction of the adjudicator to decide on any other matter not referred to the adjudicator pursuant to sections 5 and 6.

(3) Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1).

[17] In dealing with ss 5–6 and 26 of the CIPAA 2012 that pave way for the adjudicator to deal with issues relating to time limit, form or content, etc. That is to say, any irregularity and/or non-compliance of the provision of ss 5–6 do not mean that the adjudicator will not have jurisdiction to hear the dispute. Non-compliance if any, can be remedied and/or condone by the adjudicator as set out in the section. The said s 26 reads as follows:

26 Power of adjudicator not affected by non-compliance

(1) Subject to subsection (2), the non-compliance by the parties with the provisions of this Act whether in respect of time limit, form or content or in any other respect shall be treated as an irregularity and shall not

invalidate the power of the adjudicator to adjudicate the dispute nor nullify the adjudication proceedings or adjudication decision.

(2) The adjudicator may on the ground that there has been non-compliance in respect of the adjudication proceedings or document produced in the adjudication proceedings:

(a) set aside either wholly or partly the adjudication proceedings;

(b) make any order dealing with the adjudication proceedings as the adjudicator deems fit; or

(c) allow amendment to be made to the document produced in the adjudication proceedings.

[18] The second stage is related to adjudication claim and response. It is a strict requirement under s 5 of the CIPAA 2012 that the unpaid party may refer a dispute arising from a payment claim under s 5. Why we say it is a strict requirement is that the law provides for parties to extent the adjudicator's jurisdiction only in writing and in consequence the unpaid party cannot unilaterally extent the scope of its claim. Equally the non-paying party also cannot extent the scope of its defence for adjudicator's consideration without a written agreement between the parties as set out in s 27(2). The time frame set out in ss 5, 6, 9, 16, etc (subject to s 26) need to be strictly complied with, failing which the parties will not be able to benefit from the statutory rights provided in CIPAA 2012. If any claim or defence has been left out in payment claim or payment response, it may be taken up later in the arbitration proceedings if the construction contract has an arbitration clause, failing which in litigation proceedings.

[19] The relevant sections for second stage are ss 5–7, 9–10 and 26–27, etc.

Section 7 reads as follows:

7 Right to refer dispute to adjudication

(1) An unpaid party or a non-paying party may refer a dispute arising from a payment claim made under section 5 to adjudication.

(2) The right to refer a dispute to adjudication shall only be exercised after the expiry of the period to serve a payment response as specified under subsection 6(3).

(3) A dispute referred to adjudication under this Act is subject to the Limitation Act 1953 [Act 254], Sabah Limitation Ordinance [Cap. 72] or Sarawak Limitation Ordinance [Cap. 49] as the case may be.

Section 9, reads as follows:

9 Adjudication claim

(1) The claimant shall, within ten working days from the receipt of the acceptance of appointment by the adjudicator under subsection 22(2) or 23(2), serve a written adjudication claim containing the nature and description of the dispute and the remedy sought together with any supporting document on the respondent.

(2) The claimant shall provide the adjudicator with a copy of the adjudication claim together with any supporting document within the time specified under subsection (1).

Section 10, reads as follows:

10 Adjudication response

(1) The respondent shall, within ten working days from the receipt of the adjudication claim under subsection 9(1), serve a written adjudication response which shall answer the adjudication claim together with any supporting document on the claimant.

(2) The respondent shall provide the adjudicator with a copy of the adjudication response together with any supporting document within the time specified under subsection (1).

(3) If the respondent fails to serve any adjudication response, the claimant may proceed with the adjudication after the expiry of the time specified under subsection (1).

[20] Once the adjudication is triggered, the only way to challenge the adjudication award in Malaysia is to make an application to set aside the award. There is no provision unlike the Arbitration Act 2005 ('the AA 2005') to make separate challenges on the issue of jurisdiction, biasness, qualification of adjudicator, etc. That is to say, there cannot be an application as in the instant case to challenge the jurisdiction of the adjudicator purportedly under s 41 of the CIPAA 2012. We take the view that the learned trial judge ought to have dismissed the purported s 41 application *at limine*. The purported s 41 complaint (if any) can only be raised in an application to set aside the adjudication award. The provisions in statutes and case laws in other jurisdiction may differ.

[21] Unlike the AA 2005, the CIPAA 2012 does not provide active or passive remedy. The one and only remedy to question the adjudicator or adjudication process or jurisdiction, etc is pursuant to s 15 to be read with s 13 of the CIPAA 2012. These are the hallmark sections of the CIPAA 2012 to demonstrate that it is a summary process and the court jurisdiction is limited to setting aside of the award and/or stay of the award under s 16. There is no jurisdiction for the court to hear a purported application under s 41 of the CIPAA 2012.

The said s 13, reads as follows:

13 Effect of adjudication decision

The adjudication decision is binding unless:

(a) it is set aside by the High Court on any of the grounds referred to in section 15;

(b) the subject matter of the decision is settled by a written agreement between the parties; or

(c) the dispute is finally decided by arbitration or the court.

[22] In dealing with a s 15 application or for that matter, s 16 application, the court may take cognisance of the salutary guidance of Dyson J (as he then was) in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93, where His Lordship in dealing with a similar Act, had this to say:

> The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement: see s 108(3) of the Act and paragraph 23(2) of Part 1 of the Scheme. The timetable for adjudications is very tight (see s 108 of the Act). Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. So far as procedure is concerned, the adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially (s 108(2)(e) of the Act and paragraph 12(a) of Part 1 of the Scheme). He is, however, permitted to take the initiative in ascertaining the facts and the law (s 108(2)(f) of the Act and paragraph 13 of Part 1 of the Scheme). He may, therefore, conduct on entirely inquisitorial process, or he may, as in the present case, invite representations from the parties. It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.

(See paper by Lim Chong Fong titled 'The Legal Implications of CIPAA', presented at the Construction Industry Payment & Adjudication Act (CIPAA) 2012 Conference organised by KLRCA).

[23] The guidelines of the English Court of Appeal in *Carillion Construction Ltd v Devonport Royal Dockyard* [2005] EWHC 778 (TCC), will be helpful when hearing a s 15 application. The English Court of Appeal had asserted: (a) the unsuccessful party must pay the adjudication award and if he is not happy, must challenge it through arbitration proceedings; (b) challenges based on excess of jurisdiction and/or breach of natural justice (save in the plainest cases) ought not be entertained or words to that effect. The view expressed by the English Court of Appeal, inter alia, reads as follows:

A 85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should only be in rare circumstances that the courts will interfere with the decision of an adjudicator. The
B courts should give no encouragement to the approach adopted by DML in the present case; which (contrary to the DML's outline submissions, to which we have referred in para 66 of this judgment) may, indeed aptly be described as 'simply scrabbling around to find some argument, however tenuous, to resist payment.

C 86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels of 'excess of jurisdiction' or 'breach of natural justice'. It must be kept in mind that the majority of the adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act
D as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his subcontractors will be driven into insolvency through a wrongful withholding of
E payments properly due. The statutory scheme provides a means of meeting legitimate cash-flow requirements of contractors and their subcontractors. The need to have the 'right' answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt whether Parliament
F contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme. We have every sympathies for an adjudicator faced with the need to reach a decision in a case like the present.

87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the
G adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense — as, we suspect, the costs incurred in the
H present case will demonstrate only too clearly.

[24] Trial courts must take note that a complaint related to breach of natural justice plays a lesser role in arbitration proceedings when the complainant is not able to demonstrate prejudice. On the issue of natural justice at p 340 in
I the book titled 'International Arbitration: With Commentary To Malaysian Arbitration Act 2005', the author says:

> On the issue of natural justice, the applicant's complaint will be weighty if he had objected to procedure or was not the cause for that state of conduct or was not aware of the proceedings itself, and has been prejudiced.

And at p 283:

> The dual requirements set out in this section have been founded on the rules of natural justice and in the Malaysian context the 'fairness rule' envisaged under the Federal Constitution. Whether there was a breach will depend on the facts and success of the challenge and this will depend on whether the arbitral tribunal on the whole had resolved the dispute objectively. (See *PT Reasuransi Umum Indonesia v Evanton Insurance Co* (1993) 8 International Arbitration Report (No. 1); *Kanda v Government of Malaysia* (1962) AC 322).
>
> It is also well established, it is not correct to say that for every violation of a facet of natural justice or of a rule incorporating such facet, the order passed is altogether void and ought to be set aside without further enquiry. The ultimate test is the element of 'prejudice' and/or the 'intensity of the prejudice'. (See *State Bank of Patiala & Ors v SK Sharma* (1996) 3 SCC 364).

[25] On the issue of natural justice and fairness rule, Humphrey Lloyd J in *Balfour Beatty Construction Ltd v Lambeth London Borough Council* [2002] EWHC 597 (TCC), had this to say:

> 29. Nevertheless, in my judgment, ... in determining whether a party has been treated fairly or in determining whether the adjudicator has acted impartially, it is very necessary to bear in mind that the point or issue which is to be brought to the attention of the parties must be one of which is either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant. It is now clear that the construction industry regards adjudication not simply as a staging post towards the final resolution of the dispute in arbitration or litigation but as having in itself considerable weight and impact that in practice goes beyond the legal requirement that the decision has for the time being to be observed. Lack of impartiality or of fairness in adjudication must be considered in that light. It has become all the more necessary that, within the rough nature of the process, decisions are still made in a basically fair manner so that the system itself continues to enjoy the confidence it now has apparently earned. The provisional nature of the decision also justifies ignoring non-material breaches. Such errors, if apparent (as they usually are), will be rectified in any negotiation and settlement based upon the decision. The consequence of material issues and points is that the dispute referred to adjudication will not have been resolved satisfactorily by any fundamental standard and the chances of it providing the basis for a settlement are much less and the chances of it proceeding to arbitration or litigation are much greater however the time limits, the nature of the process and the ultimately non-binding nature of the decision, all mean that the standard required in practice is not that which is expected of an arbitrator. Adjudication is closer to arbitration than an expert determination but it is not the same.

[26] It is also essential to note that the equivalent Act related to CIPAA 2012 in other countries such as England, Australia, New Zealand, Singapore, etc. are not similarly worded though it provides a summary process to secure interim payments for construction related works (see *'Statutory Construction Adjudication: Analysis of the New Zealand and Malaysian Legislations'* by

Noushad Ali Nassem Amer Ali (PhD Thesis)). For example, Singapore Building and Construction Industry Security of Payment Act ('the BCISP 2005') does not have a specific provision to set aside the adjudication award and/or the grounds to do so in contrast to our s 15 and/or a provision to stay the award as per our s 16. However, Singapore has provision to review the adjudicator's award but not by the courts. Their s 27(5) impliedly recognises that the adjudication award can be set aside but with a condition of payment into court the adjudicated sum (see ss 18, 19 and 27 of the Building and Construction Industry Security of Payment Act 2005). Section 27 of the BCISP 2005 reads as follows:

> 27 Enforcement of adjudication determination as judgment debt, etc.
>
> (1) An adjudication determination made under this Act may, with leave of the court, be enforced in the same manner as a judgment or an order of the court to the same effect.
>
> (2) Where leave of the court is so granted, judgment may be entered in the terms of the adjudication determination.
>
> (3) An application for leave to enforce an adjudication determination may not be filed in court under this section unless it is accompanied by an affidavit by the applicant stating that the whole or part of the adjudicated amount has not been paid at the time the application is filed.
>
> (4) If the affidavit referred to in subsection (3) indicates that part of the adjudicated amount has been paid, the judgment shall be for the unpaid part of the adjudicated amount.
>
> (5) Where any party to an adjudication commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section, he shall pay into the court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner as the court directs or as provided in the Rules of Court (Cap. 322, R 5), pending the final determination of those proceedings.

[27] The Singapore Court of Appeal in *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401, dealt with one or two issues related to this appeal and their s 27. The editorial observation in that case reads as follows:

> In a setting-aside application, the court could decide whether the adjudicator was validly appointed. If there was no payment claim or service of a payment claim, the appointment of an adjudicator would be invalid, and the resulting adjudication determination would be null and void. Even if there was a payment claim and service of that payment claim, the court might still set aside the adjudication determination on the ground that the claimant, in the course of making an adjudication application, had not complied with one (or more) of the provisions under the Act which was so important that it was the legislative purpose that an act done in breach of the provision should be invalid, whether it is labelled as an

essential condition or a mandatory condition. A breach of such a provision would result in the adjudication determination being invalid.

[28] Chan Sek Keong CJ, delivering the judgment of the Court of Appeal related to the jurisdiction or power of the adjudicator, had this to say:

> 36. In our view, if the respondent's objection to the jurisdiction or power of the adjudicator to conduct the adjudication is based on an invalid appointment, such a jurisdictional issue should be raised immediately with the court and not before the adjudicator. The reason is that since the objection is against the adjudicator's jurisdiction as an adjudicator, he has no power to decide if he has jurisdiction or not. He cannot decide his own competency to act as an adjudicator when such competency is being challenged by the respondent. An adjudicator who decides the issue may face one or other of the following consequences. If he accepts the respondent's objection and dismisses the payment claim, the claimant may commence court proceedings against him to compel him to adjudicate the payment claim. If he dismisses the respondent's objection and makes an award, the respondent could still raise the same objection in enforcement proceedings with respect to his award. Accordingly, the adjudicator should proceed with the adjudication and leave the issue to the court to decide.

[29] The above case will demonstrate that the jurisprudence related to construction of adjudication claim in Singapore may not be strictly the same within the spirit and intent of the CIPAA 2012. Under the CIPAA 2012 all issues related to the adjudicator has to be dealt pursuant to s 15 of the CIPAA 2012 and for that to be done the award must have been issued.

[30] In the instant case, View Esteem had made a single application to set aside the adjudicating order as well as seeking for stay of the adjudication decision. We take the view that such an application is embarrassing as well as flawed and ought to have been dismissed at *limine*. The reason being that s 16 envisages that there is already in existence an application to set aside the adjudication award. In consequence, a stay application can only be filed upon having filed an application for setting aside.

[31] Further, trial court must be extremely slow in granting an application for stay as the purpose of the CIPAA 2012 is to ensure that the contractor gets his due immediately. In dealing with the stay application, trial court ought also take note that in almost all standard form of construction contract, the employee is protected by unjustified claim from the contractor as there will be provision for certification of the claim by neutral persons such as QS as well as architect as in the instant case.

[32] In addition, the CIPAA 2012 relates to interim payments and not the final accounts between the parties. The employer's complaint (if any) that the stay must be granted because the contractor is insolvent, etc may not be

justifiable ground when an adjudicator who normally will be an expert in the construction field and chosen by reputable institution has issued the award for just payment. Unless there is overwhelming evidence that the contractor will not be able to complete his contractual obligations as well as meet up with the financial obligation to the employer, a stay should not be granted. Even if a stay is granted, it must be on condition that the money is paid to court and/or stakeholders account as the court deem fit. Case laws in other jurisdiction take slightly a flexible approach to stay applications. As we have stated earlier, our sections are not similar to those in other jurisdictions. For example, the consideration for stay in Singapore is not the same as in Malaysia within the spirit and intent of the CIPAA 2012. In any event, Singapore courts do not readily grant stay and the related jurisprudence was well articulated in the decision of Singapore Court of Appeal in the case of *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] SGCA 32, where the Chief Justice of Singapore Sundaresh Menon had this to say:

> 59. We have said above that the purpose of the Act is to ensure, inter alia, that even though adjudication determinations are interim in nature, successful claimants are paid. To this end, under s 22(1), the respondent must pay the adjudicated amount either within seven days after being served with the adjudication determination (see s 22(1)(a)), or by the deadline stipulated by the adjudicator (see s 22(1)(b)). The claimant can suspend work (see s 26(1)(d)) or take a lien on goods supplied (see s 25(2)(d)) if the respondent fails to pay. If the respondent intends to apply for a review of the adjudication determination, he must first pay the adjudicated amount to the claimant: see s 18(3). If the respondent wants to set aside the adjudication determination, he must pay into court as security the unpaid portion of the adjudicated amount: see s 27(5). This requirement is repeated in O 95 r 3(3) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). These provisions all point to one thing: where a claimant succeeds in his adjudication application, he is entitled to receive the adjudicated amount quickly and cannot be denied payment without very good reason.
>
> 60. Notwithstanding these provisions, it is clear that the court retains the power to stay the enforcement of an adjudication determination. In our judgment, this follows from the provisional nature of an adjudication determination. Such a determination is not a final determination of the parties' rights. Rather, it establishes a position with finality for the *present*, and this position continues until the rights of the parties are eventually and finally determined or resolved. It follows from this that the court retains the discretion to order a stay of enforcement of an adjudication determination where it is necessary to do so in order to secure the ends of justice. There are no local cases on point on the exercise of this discretion, although we can take reference from foreign cases, bearing in mind the scheme of the Act and our Parliament's intention.

[33] The Singapore Court of Appeal, after having considered a number of authorities from different jurisdiction went to conclude as follows:

> 71. ... Whether that is true or not, the comparison is not one that is apt. An adjudication determination is provisional in the sense that it may ultimately be

reversed if it is challenged in a court or tribunal or some other dispute resolution body. However, as far as the rights of the parties to the adjudication are concerned, to the extent that the adjudication determination remains intact pending any such challenge, it has the effect of absolutely and conclusively determining the parties' rights until and unless it is eventually reversed in accordance with the provisions of the Act — see paras 13 and 18 above. Hence, while we are prepared to recognise the possibility of granting a stay of enforcement of an adjudication determination because of the possibility of a different outcome emerging eventually, a stay will not readily be granted having regard to the overall purpose of the Act, which is precisely to avoid and guard against pushing building and construction companies over the financial precipice.

[34] We have read the appeal records and able submissions of the counsel. After much consideration to the submission for the appellant, we take the view that the appeal has no merits. Our reasons, inter alia, as follows:

(a) the purported s 41 application to challenge the jurisdiction of the adjudicator is unsustainable for reasons stated earlier and ought to have been dismissed in *limine*;

(b) in any event, the jurisdictional challenge was considered by the adjudicator and the complaint was not entertained. The learned trial judge had also meticulously considered the relevant issues and came to the conclusion that the complaint has not merit;

(c) in respect of the application to set aside the adjudications award and/or stay the award, as we had said earlier, was an embarrassing as well as a flawed application under s 16 and the court ought to have dismissed at *limine* and/or strike out the prayer for stay and proceeded to hear only the prayer for setting aside the adjudication award;

(d) in any event the learned trial judge has considered the relevant principles relating to setting aside as well as stay and came to the conclusion that the application must be dismissed; and

(e) for reasons stated earlier, it is our considered view that the setting aside and stay application has no merits and rightly dismissed by the trial court. In consequence, the learned trial judge was correct in allowing the enforcement application for the enforcement of the adjudication award.

[35] For reasons stated above, we dismiss the appeal with costs. Deposit is to be refunded.

We hereby order so.

Prasad Abraham JCA (delivering supporting judgment of the court):

[36] I have read the judgment of my learned brother J Datuk Dr Hj Hamid Sultan Backer and I am in agreement that the appeals in respect of all three applications should be dismissed. I also accept the reasoning behind the judgment. However as I feel the law is in fairly unchartered waters as far as the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA 2012') is concerned, I feel obliged to render a few observations on the effect of s 26 of the CIPAA 2012, which would be useful for adjudication practitioners.

[37] In dealing with the application to set aside the adjudication award under s 15(b), (c) and (d) of the CIPAA 2012 in particular, the appellants contends that learned judge erred in law in holding that the appellant was not entitled to raise its defences in the absence of raising the same defences in its payment response under s 6 of the CIPAA 2012. In the course of appellants counsel submissions we invited counsel to tender additional submissions on the effect of s 26 of the CIPAA 2012 and whether the appellant could avail itself of the said section to still raise these defences.

[38] My learned brother has in his judgment set out in extensio, the payment claim and the payment response pursuant to ss 5 and 6 of the CIPAA 2012. Let me now examine s 26 of the CIPAA 2012 and I set out the said section *in toto*.

> 26 Power of adjudicator not affected by non-compliance
>
> (1) Subject to subsection (2), the non-compliance by the parties with the provisions of this Act whether in respect of time limit, form or content or any in any other respect shall be treated as an irregularity and shall not invalidate the power of the adjudicator to adjudicate the dispute nor nullify the adjudication proceedings or adjudication decision.
>
> (2) The adjudicator may on the ground that there has been noncompliance in respect of the adjudication proceedings or document produced in the adjudication proceedings —
>
> (a) set aside either wholly or partly the adjudication proceedings;
>
> (b) make any order dealing with the adjudication proceedings as the adjudicator deems fit; or
>
> (c) allow the amendment to be made to the document produced in the adjudication proceedings.

[39] The first point to be gleaned is that s 26 as drafted is peculiar to our legislation and does not appear in similar legislation of comparable jurisdictions. A brief look at Hansard, undertaken does not show what the legislators had in mind when enacting that provision so we are constrained to decipher its effects from the language that the provision uses.

[40] I would like to point out that Parliament in the arrangement of the sections of the CIPAA 2012 places s 26 in between the mechanics and jurisdiction of the process of adjudication. In looking at s 26(1) non-compliance by the parties with the provisions of this act whether in respect of time limit, form or content or in any other respect shall be treated as an irregularity. I refer to the Court of Appeal decision of *Perantara Properties Sdn Bhd v JMC Kelana Square* [2016] 5 CLJ 367 and to the leading judgment of David Wong JCA and I quote:

> 14. Section 17A embodies the concept of purposive approach which was explained by the House of Lords in *Pepper v Hart* [1993] AC 593 (by majority) through Lord Griffiths as this:
>
> The ever increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. *The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.*

[41] The intention of Parliament is clear in that any irregularity in wide terms will not render the adjudication proceedings a nullity in consonance with the spirit of the act ie to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication.

[42] To come within the purview of s 26(1), a party must invoke the provisions of s 26(2) of the CIPAA 2012 relying on the subsection most suitable to the facts of the dispute before the adjudicator.

[43] The appellant should have moved the adjudicator formally to allow matters not raised under the payment response pursuant to s 26(2)(b)/(c) of the said section. The adjudicator would have had to deal with that question and rule accordingly and such a ruling would not in my view be reviewable. If the adjudicator had refused to entertain the application on a point of jurisdiction, then the same would be subject to review.

[44] In the instant appeals the appellant argued that as a matter of law, they were entitled to raise matters beyond the payment response. The only option available was to exercise their rights under s 26 of the CIPAA 2012 which had not been done in this case.

[45] In any application made to the adjudicator under s 26 of the CIPAA

2012, the approach in my view to be taken would be akin with the methodology taken by the courts in its approach to O 2 of the Rules of the High Court 1980 the predecessor of the Rules of Court 2012 (ie):

(a) the adjudicator should have regard to the interest of the defaulting party;

(b) likely prejudice to the other party resulting from any exercise of discretion by the adjudicator;

(c) the requirement of rules of natural justice; and

(d) the object and intent of the CIPAA 2012 Act 2012.

[46] I refer to the decision of the Federal Court in *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 and to the decision of Mohd Azmi FCJ at p 575 and I quote:

> On the basis of the above principle, the discretion available to this court to cure irregularities under O 2 r 1(1) of the RHC read together with s 69(4) of the Courts of Judicature Act 1964 (the equivalent of the English O 59 r 10(3)) and as well as s 101 of the same Act which allows this court to discount, 'any error, defect or irregularity whether in the decision or otherwise, not affecting the merits or the jurisdiction of the court', should only be undertaken by the court in the absence of prejudice. Thus defects affecting merits or the jurisdiction of the court ought not to be cured, in the exercise of the discretionary power.

[47] The issue of jurisdiction encompassed in s 26 of the CIPAA 2012 concerns jurisdiction on the question of irregularity of procedure or of a defect in a contingent jurisdiction' or non-compliance with statutory conditions precedent to the validity of a step in the proceedings. I refer to the decision of the High Court in Singapore in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering and Construction Co Ltd* [2010] 1 SLR 658, where Her Ladyship Judith Prakash J explains the distinction and I quote:

> 44 Thus, it seemed that when what was being alleged was an absolute lack of jurisdiction on the part of a particular tribunal or court to hear a particular dispute, 'jurisdiction' being used in the strict sense of capacity to hear, then if the tribunal concerned does not have such jurisdiction, any party to the dispute may assert the lack of jurisdiction at any stage and can never be held to be estopped from doing so or to have waived its right of protest. On the contrary, when it is a question of irregularity of procedure or contingent jurisdiction or noncompliance with a statutory condition precedent to the validity of a step in the litigation, such irregularity or non-compliance can be waived because the effect of the waiver would not be to create or confer any jurisdiction that did not previously exist.
>
> 45 It therefore appeared to me that I could not answer the preliminary question of whether the respondent was entitled to raise its challenges to jurisdiction until I determined whether or not such challenge related to competence to hear or only to the exercise of the jurisdiction. I therefore had to consider the substantive question in order to determine the preliminary point.

[48] It is my view that s 26(1) of the CIPAA 2012 is wide in terms and covers all aspects of the act including adjudication proceedings s 26(2) deals specifically with non-compliance in respect of adjudicator proceedings and the powers reserved to the adjudicator are wide as set out in (2)(a), (b) or (c).

[49] The adjudicator in considering issues raised under s 26 will consider each application under the guidelines that I have set out earlier. In doing so the adjudicator will consider the principle as set out in 6(2) of the CIPAA 2012 and I find the decision of the Court of Appeal Singapore in *WY Steel Construction Pte Ltd v Osko Pte Ltd* [2013] SGCA 32 provides useful guidance on the point and I quote from the judgment of Lordship Sundaresh Menon CJ:

> 40 In our view, none of these provisions either individually or collectively permit an adjudicator to ignore s 15(3). Section 16 sets out generally the rules relating to the commencement of adjudication and the adjudication process. Under s 16(3)(c), an adjudicator must comply with the principles of natural justice; these must include the duty to give the parties adequate notice and an opportunity to be heard. However, these rules are always contextual. We have already discussed the centrality of the concept of temporary finality to the adjudication scheme under the Act. *A respondent is given a chance to respond to a payment claim by producing, first, a payment response and then (if the claimant proceeds to apply for adjudication of his payment claim) an adjudication response. If he fails to provide a payment response and if, as a result, the adjudicator is mandated not to consider material that he seeks to introduce later, he has not been denied his right and opportunity to be heard. Rather, he has simply chosen not to exercise it and the rules of natural justice cannot then be called in aid. Simply put, in such a scenario, the respondent has had his opportunity, for the purposes of the hearing that culminates in the provisional ruling that has temporary finality, to make his case and he has failed to take that opportunity.*

However decisions from other jurisdictions must be viewed with circumspect due to the absence of a similar provision in their legislation akin to s 26 of the CIPAA 2012 but they remain persuasive. At any rate, the adjudication can consider the point in determining whether to exercise discretion under s 26 of the CIPAA 2012.

[50] For all the aforesaid reasons I will dismiss the appeals with costs. And the deposit to be refunded.

Appeal dismissed with costs.

Reported by Afiq Mohamad